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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-886

CLARK J. UMENTUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion below 1

Jurisdiction 2

Questions presented 2

Statutes presented 2

Statement of the case 3

Reason for granting the writ 5

The Decision Below Is In Direct Conflict With The Decisions Of Other Courts Of Appeals On The Same Matters 5

A. The holding of the court below that a single count of an indictment is not duplicitous when it alleges both distribution of a controlled substance and possession with intent to distribute a controlled substance is in direct conflict with holdings of the Court of Appeals for the Fifth Circuit 5

B. The holding of the court below that it is not necessary to instruct the jury on the necessity of finding an overt act in order to convict in a conspiracy case is in direct conflict with the holding of the Court of Appeals for the Tenth Circuit 7

Conclusion 8

PAGE

Appendix:

Opinion of United States Court of Appeals for the Seventh Circuit in *United States* v. *Clark J. Umentum* 1a

Opinion of United States Court of Appeals for the Seventh Circuit in *United States* v. *Michael Joseph Orzechowski* 14a

Opinion of United States District Court for the Eastern District of Wisconsin, the Hon. Myron L. Gordon, presiding, in *United States* v. *Clark J. Umentum, et al.* (excerpts) 33a

CITATIONS

Cases:

Bingler v. Johnson, 394 U.S. 741 (1969) 5

Cordova v. United States, 303 F.2d 454 (10th Cir. 1962) 6

United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975), *petition for cert. filed,* 45 U.S.L.W. 3011 (July 2, 1976) 6

United States v. Costello, 483 F.2d 1366 (5th Cir. 1973) 6

United States v. Curry, 512 F.2d 1299 (4th Cir.), *cert. denied,* 423 U.S. 832 (1975) 6

United States v. DeJesus, 520 F.2d 298 (1st Cir.), *cert. denied,* 423 U.S. 865 (1975) 7

United States v. Herbert, 502 F.2d 890 (10th Cir.), *cert. denied,* 420 U.S. 931 (1974) 6

United States v. Hobbs, 392 F.Supp. 444 (D.Mass. 1975) 6

PAGE

United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975), *cert. denied,* 96 S.Ct. 1413 (1976) 6

United States v. King, 521 F.2d 61 (10th Cir. 1975) 7

United States v. Nichols, 401 F.Supp. 1377 (E.D.Mich. 1975) 6

United States v. O'Malley, 383 U.S. 627 (1966) 5

United States v. Michael Joseph Orzechowski, No. 76-1315 (7th Cir., November 24, 1976) 1, 2, 4

United States v. Stevens, 521 F.2d 334 (6th Cir. 1975) 6

Statutes:

18 U.S.C. § 2 3

21 U.S.C. § 841(a)(1) 2, 3, 6

21 U.S.C. § 846 .....2, 3, 7

28 U.S.C. § 1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 24, 1976.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported, but it appears in the Appendix at 1a, *infra*. The opinion in the Court of Appeals relies in large part upon the opinion filed the same date by the Court of Appeals in the case of *United States* v. *Michael Joseph Orzechowski,*

No. 76-1315. The *Orzechowski* opinion is also set forth in the Appendix at 14a, *infra*.

The opinion of the United States District Court for the Eastern District of Wisconsin is published at 401 F.Supp. 746 (E.D.Wis. 1975). So much of the District Court opinion as pertains to the issues raised in this petition is set forth in the Appendix at 33a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 24, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the offense of distribution of a controlled substance is distinct from the offense of possession of a controlled substance with intent to distribute, so that a single count of an indictment alleging both offenses is duplicitous.

2. Whether it is necessary to instruct a jury concerning the requirement of a finding of the commission of an overt act in a conspiracy prosecution under 21 U.S.C. § 846.

STATUTES INVOLVED

21 U.S.C. § 841(a)(1):

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

21 U.S.C. § 846:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both but may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the offense or conspiracy."

STATEMENT OF THE CASE

On June 4, 1975, petitioner, together with four others, was indicted for a conspiracy to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. § 2. Three of those indicted entered pleas of guilty; petitioner and a co-defendant went to trial. The co-defendant was acquitted; petitioner was convicted of both counts and sentenced to two concurrent seven year terms of imprisonment followed by a statutory three year special parole period. The United States Court of Appeals for the Seventh Circuit affirmed the convictions on November 24, 1976.

The indictment was framed in two counts: a conspiracy count under 21 U.S.C. § 846, and a substantive count under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The conspiracy allegation, Count I, alleged no overt act in furtherance of the conspiracy, and the jury was not instructed as to any requirement that such an overt act need be found from the evidence before a guilty verdict could be reached.

The substantive count, Count II, charged petitioner both with the possession with intent to distribute and with the actual distribution of cocaine.

By pretrial motion, petitioner challenged the sufficiency of Count I because it failed to allege any overt acts; this same challenge was made to the court's instructions at the

close of evidence because the instructions did not require the jury to find an overt act from the evidence in order to convict petitioner. Count II was challenged by pretrial motion as being duplicitous on the ground that it alleged two distinct offenses in a single count.

The District Court rejected petitioner's challenges to the indictment and his request for an instruction requiring the finding of an overt act. Appendix at 33a, *infra*. The Court of Appeals affirmed petitioner's conviction, relying in large part upon its decision entered the same day in *United States* v. *Michael Joseph Orzechowski*, No. 76-1315, set forth *infra* in the Appendix at 14a.

REASON FOR GRANTING THE WRIT

The Decision Below Is In Direct Conflict With The Decisions Of Other Courts Of Appeals On The Same Matters.

A. The holding of the court below that a single count of an indictment is not duplicitous when it alleges both distribution of a controlled substance and possession with intent to distribute a controlled substance is in direct conflict with holdings of the Court of Appeals for the Fifth Circuit.

The number of cases reaching the Courts of Appeals which deal with controlled substance offenses is steadily increasing. It has become popular among federal prosecutors to charge defendants who distribute controlled substances both with possession of the substance with intent to deliver it and with the substance's actual distribution.

This charging scheme has resulted in numerous challenges to controlled substance indictment with a corresponding increase in decisions by Courts of Appeals concerning the legitimacy of such charges. This phenomenon ordinarily would not raise a problem requiring resolution by this Court. However, the appellate decisions on this issue have not been harmonious. For this reason, this Court should accept the petition and grant certiorari. *Bingler* v. *Johnson*, 394 U.S. 741 (1969); *United States* v. *O'Malley*, 383 U.S. 627 (1966).

The Court of Appeals for the Fifth Circuit has held that possession with intent to distribute a controlled substance and distribution of the same controlled substance are separate offenses since they require proof of different

facts and elements. *United States* v. *Costello,* 483 F.2d 1366 (5th Cir. 1973). Since they are separate offenses, a defendant could be sentenced for each separate offense with the sentences to run consecutive to one another. Similarly, in the Fifth Circuit, a single count of an indictment joining distribution with possession with intent to distribute would be duplicitous.

Other circuits, including the Seventh Circuit, have held that the acts of possession with intent to distribute and actual distribution are but different means of violating the same statute, 21 U.S.C. § 841(a)(1), and therefore constitute but one offense. *Cordova* v. *United States*, 303 F.2d 454 (10th Cir. 1962); *United States* v. *Stevens,* 521 F.2d 334 (6th Cir. 1975); *United States* v. *Curry,* 512 F.2d 1299 (4th Cir.), *cert. denied,* 423 U.S. 832 (1975).

This conflict in decisions is real and apparent, and this Court has never granted certiorari to resolve the conflict. See, *e.g., United States* v. *Horsley,* 519 F.2d 1264 (5th Cir. 1975), *cert. denied,* 96 S.Ct. 1413 (1976); *United States* v. *Herbert,* 502 F.2d 890 (10th Cir.), *cert. denied,* 420 U.S. 931 (1974). Because the issue has never been resolved, cases continue to flood the Courts of Appeals where the issue is decided differently, thereby exposing defendants to disparate treatment. See, *e.g., United States* v. *Atkinson,* 512 F.2d 1235 (4th Cir. 1975), *petition for cert. filed,* 45 U.S.L.W. 3011 (July 12, 1976); *United States* v. *Stevens,* 421 F.2d 334 (6th Cir. 1975); *United States* v. *Nichols,* 401 F.Supp. 1377 (E.D.Mich. 1975); *United States* v. *Hobbs,* 392 F.Supp. 444 (D.Mass. 1975).

In this circumstance, it is not only appropriate but essential that this Court issue its writ and clarify what is presently a hodgepodge of conflicting decisions.

B. The holding of the court below that it is not necessary to instruct the jury on the necessity of finding an overt act in order to convict in a conspiracy case is in direct conflict with the holding of the Court of Appeals for the Tenth Circuit.

Just as it is currently in vogue for prosecutors to charge both delivery and possession with intent to deliver a controlled substance, so is it also a prevalent practice to include a conspiracy count whenever more than one person is present at the time of delivery. As a consequence, challenges to conspiracy counts frequently arise, and the lower courts must determine the sufficiency of the allegations, proof and instructions.

Although the lower courts are in apparent agreement that the conspiracy statute, 21 U.S.C. § 846, does not require allegation of overt acts, see *United States* v. *DeJesus,* 520 F.2d 298 (1st Cir.), *cert. denied,* 423 U.S. 865 (1975), and *United States* v. *King,* 521 F.2d 61 (10th Cir. 1975), the courts are clearly not in harmony on the question of whether the jury must be instructed on the necessity of finding an overt act before conviction is allowed. *Compare United States* v. *King, supra,* with the instant case.

In *King,* the Court of Appeals for the Tenth Circuit held that conspiracy was not punishable as a state of mind and becomes a crime only if an overt act is performed. 521 F.2d at 63. In the case *sub judice,* the Seventh Circuit held that no overt act is required in the allegations, the proof, or the instructions of a conspiracy count.

The conflict is clear: a defendant in Chicago may be punished for his thoughts while a defendant in Denver is acquitted by a properly instructed jury. This Court must resolve the conflict.

CONCLUSION

Because of these clear conflicts in the decisions of the Courts of Appeals, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1210

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLARK J. UMENTUM,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 75 Cr 103 — Myron L. Gordon, *Judge.*

Argued September 21, 1976—Decided November 24, 1976

Before HASTINGS, *Senior Circuit Judge,* and PELL and WOOD, JR., *Circuit Judges.*

WOOD, JR., *Circuit Judge.* On June 4, 1975, defendant, together with four others, was charged in Count I of the indictment with conspiracy to possess and distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of 21 U.S.C. § 841(a)(1) and § 846, and 18 U.S.C. § 2; and in Count II with possession with intent to distribute and distribution of 878.5 grams of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Two other counts are not involved in this appeal. Three of the defendants entered pleas of guilty to certain counts, one

was found not guilty. The defendant was found guilty of both Counts I and II following trial by jury and sentenced to two concurrent seven year imprisonment terms, followed by a statutory three year special parole period. In *United States* v. *Umentum,* 401 F.Supp. 746 (E.D. Wis. 1975), the pretrial matters in this case are considered.

The transactional evidence is not in dispute. Following two telephone conversations in April, 1975, between a special agent of the Drug Enforcement Administration with one of defendant's co-conspirators, two special agents not known by the defendant to be special agents, met in person with the defendant and other co-conspirators for the purpose of concluding a sale of 25 ounces of cocaine for $40,625. This meeting terminated with the arrest of the defendant and the seizure by the agents of the plastic bag of white powder which had been represented by the defendant to be cocaine.

The defendant raises six issues on appeal:

(1) Failure of the Government to produce certain internal memoranda of the Drug Enforcement Administration;

(2) Duplicity of the indictment resulting from charges of possession with intent to distribute and distribution;

(3) Duplicitous instructions;

(4) Failure of the court to give an instruction with Count I, the conspiracy allegation, concerning the requirement of a finding of the commission of an overt act;

(5) The giving of a partial instruction on reasonable doubt; and

(6) Other objectionable instruction matters.

I.

The memoranda which the defendant claims were exculpatory and should have been produced prior to trial were certain internal government memoranda which related generally to the topic of isomers of cocaine and testing procedures which might be used to identify the isomers of cocaine. These memoranda did not directly relate to this case. This material was made available to the defense during trial and admitted as defense exhibits 8, 9, and 9A. These documents which were desired by the defense for cross-examination purposes were used for that purpose. The trial court granted defendant's motion for a continuance after the trial had begun due to some additional tests run by the Government witness shortly before trial. During this time the defendant came into possession of the Government's memoranda and was permitted to reopen cross-examination of the Government witness to make use of the memoranda.

We do not believe that these internal memoranda were required to be produced pursuant to Fed.R.Crim. P. 16 or *Brady*[1] as recently interpreted in *United States* v. *Agurs,* ..... U.S. ....., 44 U.S.L.W. 5013 (U.S. June 24, 1976). We consider the memoranda neither exculpatory nor material to the defendant's defense. This same issue is discussed more fully in *United States* v. *Orzechowski,* No. 76-1315, an opinion issued simultaneously with this opinion. In addition, in the present case the defendant had the use of these memoranda during trial. As the trial judge stated, to hold otherwise "would mean that the government would be obliged to turn over every single piece of internal study, research, communication, and point of view that the laboratories of the D.E.A. may have utilized on any phase of the world of cocaine."

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[1] *Brady* v. *Maryland,* 373 U.S. 83 (1963).

II. and III.

The issue of the duplicity in Count II charging possession with intent to distribute and distribution has likewise been resolved adversely to defendant in *Orzechowski, supra,* and merits no further discussion here. The issue of the instructions being likewise duplicitous is similarly resolved in *Orzechowski, supra.*

IV.

Count I of the indictment charging conspiracy alleges no overt act in furtherance of the conspiracy, nor was the jury instructed as to any requirement that such an overt act need be found from the evidence before a guilty verdict could be reached.

First, it is to be noted that neither § 846 of Title 21 nor its predecessor § 174, in contrast to the general conspiracy statute, 18 U.S.C. § 371, has in its language any requirement concerning an overt act.

In the lower court defendant claimed that it was necessary for the Government to charge an overt act in the indictment. He does not pursue that here, taking notice of numerous cases contrary to that claim, including *United States* v. *King,* 521 F.2d 61 (10th Cir. 1975), which, however, defendant relies on to require an overt act instruction. *See also United States* v. *Garfoli,* 324 F.2d 909 (7th Cir. 1963); *United States* v. *DeJesus,* 520 F.2d 298 (1st Cir. 1975), *cert. denied,* 423 U.S. 865. Nor is the issue on appeal the absence of proof of acts which might have been labeled overt acts since they are obvious in the record as the defendant candidly concedes in footnote 8 in his brief, page 18.

The issue remaining is should the jury have been instructed nevertheless that there was an overt act proof requirement upon the Government? The defendant relies

upon *United States* v. *King, supra.* That court held that such an instruction was necessary in a § 846 conspiracy charge regardless of the absence in the statute of an overt act requirement, and regardless of the strength of the evidence. Other cases cited by defendant, such as *United States* v. *Hutchinson,* 488 F.2d 484 (8th Cir. 1973), *cert. denied,* 417 U.S. 915 (1974), seem to assume that an overt act is a requirement of § 846 without the issue being directly raised. *Hutchinson* cites for its assumption cases involving a § 371, Title 18, charge, or a charge under its predecessor, which by their language required an overt act.[2]

Defendant further relies on other cases, such as *United States* v. *Robinson,* 503 F.2d 208 (7th Cir. 1974), *cert. denied,* 420 U.S. 949 (1975). A prosecution under 18 U.S.C. § 241, which likewise contains no overt act requirement. In that case there was proof of overt acts. The opinion does not reveal whether or not overt acts were also alleged. The issue we have here was not raised. However, in *United States* v. *Morado,* 454 F.2d 167 (5th Cir. 1972), *cert. denied,* 406 U.S. 917, it was held that § 241 does not require that any overt act be shown.

Defendant also cites other cases, such as *United States* v. *Floyd,* 496 F.2d 982 (2d Cir. 1974), *cert. denied,* 419 U.S. 1069, a § 846 prosecution, in which it appears that overt acts were charged in the indictment. Therefore the particular issue we have was not raised.

We do not believe that these cases are controlling. The matter has been previously touched on in this circuit. In *United States* v. *Cortwright,* 528 F.2d 168 (7th Cir. 1975),

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[2] *United States* v. *Skillman,* 442 F.2d 542 (8th Cir. 1971), *cert. denied,* 404 U.S. 833; *United States* v. *Falcone,* 311 U.S. 205 (1940)

a § 846 conspiracy prosecution in which overt acts were alleged, the court was concerned with the sufficiency of the evidence. The court, however, explains that all that is required in a § 846 prosecution is an agreement between two or more persons to commit any offense under the Controlled Substances Act, and at 528 F.2d 172 n.1 elaborates:

> This circuit has not required allegation or proof of an overt act in furtherance of a drug conspiracy. *United States* v. *Garfoli,* 324 F.2d 909 (7th Cir. 1963).

In *Garfoli, supra,* Judge Duffy, writing for the panel, stresses that § 174, now repealed but similar to the present § 846, contains no requirement that an overt act be alleged or proved in contrast to a § 371 conspiracy prosecution. The court held that the act of conspiracy was by itself sufficient, citing *Nash* v. *United States,* 229 U.S. 373 (1913).

In *Nash,* a Sherman Act prosecution, the Court considered a situation where no overt act was alleged. It held that the Act punished conspiracies on a common law footing in that the Act did not contain a requirement for the doing of any other act beyond conspiring. The Court distinguished other statutes which contain the added requirement and declined to read into the Sherman Act more than it found there.

In the later case of *Singer* v. *United States,* 323 U.S. 338 (1945), a Selective Training & Service Act conspiracy prosecution, the Court recognized that that Act also did not require an overt act for the offense of conspiracy but punished conspiracy "on the common law footing."

Cases other than *Cortwright, supra,* in other jurisdictions, have also recognized the precedent of older cases holding that no overt act was required under the prior

act. These cases aid in the determination of whether an overt act is required under § 846. Nothing in the congressional history of § 846 weakens the force of the earlier interpretations. *United States* v. *DeJesus, supra; United States* v. *DeViteri,* 350 F.Supp. 550 (E.D.N.Y. 1972); *United States* v. *Miller,* 387 F.Supp. 1097 (D.Conn. 1975).

We see no justification for departing from the reasoning of these latter cases and this circuit's *Cortwright* and *Garfoli* decisions, *supra.*

At common law conspiracy did not require an overt act. The Supreme Court has recognized the power of Congress to create a common law type conspiracy for specific purposes. Section 846 requires no overt act as distinguished from § 371, so we decline to read such a requirement into § 846.

An overt act, therefore, need not be charged in a § 846 conspiracy. If an overt act need not be charged, it need not be proved. If an overt act need be neither charged nor proved, there remains nothing about which to instruct on that issue.

In addition, in this case the court and counsel discussed at length this aspect of the conspiracy instructions. It is not easy to follow and understand that discussion by reading the record, but the trial court determined that the defendant preferred that the overt act requirement instruction not be used. The defendant disputes that that was what was intended. We need not resolve that aspect of the controversy.

V.

The next issue involves the instruction on reasonable doubt. On the matter of reasonable doubt the only instruction given to the jury was:

> It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt.

The defendant interprets this as not defining what reasonable doubt is, but what it is not.

The court apparently was relying on this court's opinion in *United States* v. *Shaffner,* 524 F.2d 1021 (7th Cir. 1975), *cert. denied,* 424 U.S. 920 (1976). The balance of the instruction given made it quite clear that to overcome the presumption of innocence the burden was on the Government to prove guilt beyond a reasonable doubt. To justify a guilty verdict the jury was instructed that it would have to be satisfied of the defendant's guilt beyond a reasonable doubt after careful and impartial consideration of all the evidence, rejecting suspicion or conjecture.

We do not approve of the abbreviated form used in this case, but it is less objectionable than the instruction used in *Shaffner, supra,* which was likewise not approved but which did not require reversal. In *Shaffner, supra,* the instruction elaborated on what was given here by adding, among other things, that "If that were the rule, few men, however guilty they might be, would be convicted." That language, missing in the present instruction, more nearly parallels in meaning the language found objectionable in *United States* v. *Bridges,* 499 F.2d 179 (7th Cir. 1974), *cert. denied,* 419 U.S. 1010. The instruction in that case stated that "reasonable doubt" was not for the purpose of "permitting guilty men to escape." What was given in the present case merely limited to some extent the outer extremities of proof beyond a reasonable doubt. In no event can reasonable doubt be equated with requiring proof beyond "all possible doubt." This instruction, excluding the necessity of Government proof beyond "all possible doubt," is not as objectionable as equating reasonable doubt with substantial doubt. *See United States* v. *Wright,* No. 76-1007, (7th Cir. Sept. 27, 1976).

Reasonable doubt was not slighted in final arguments. The defense argued in part:

> So, the question is: What is a reasonable doubt? It's a difficult thing to define. The Court won't define it for you. You have to think it through and think what the words mean. It means certainly not frivolous. It means certainly not emotional. It means the same thing the words mean; a reasonable doubt is a doubt that's founded in reason; it's a doubt for which you can give a reason. Are there doubts for which you can give reasons in this case? Certainly. Let's look at some of them, and we are going to go over them very quickly at this time because we will come back to each of them.

In the circumstances of this case, considering the instructions as a whole, we do not believe the instruction given requires reversal.

VI.

Other objections of the defendant are to instructions given or not given.

First, the defendant objects to the failure of the court to give an instruction defining that portion of the language of 21 U.S.C. § 812(c), Schedule II (a)(4), "chemically equivalent or identical." That issue was adversely resolved to defendant in *United States* v. *Orzechowski, supra,* decided this date and requires no further discussion.

Next, the defendant objects to so much of the court's instructions as stated that "l-cocaine is clearly covered by the statute." Even though this factual proposition was not controverted at trial or on appeal, the defendant objected in the absence of an instruction to the effect that

the other isomers of cocaine were not controlled. For the court in its instructions to assume the existence of a fact which is undisputed or proved beyond controversy is not reversible error. *United States* v. *Jonikas,* 197 F.2d 675 (7th Cir. 1952).

In the instruction conference the trial judge clearly stated his position on the issue with which we find no fault:

> Court: Well, I have held that cocaine is a controlled substance in the pretrial motions of this case, and believe that the proper way to present this case to the jury is very much in the manner that Judge Warren did, as reflected in Instruction 61A.
>
> I think the defendant is entitled to argue to the jury that the Government's testing is insufficient to establish that the substance in question fitted the 21 U. S. Code, 812 Schedule II(a)(4) definition, and I think the Court should instruct the jury that l-cocaine is within the Schedule and that it is for them to determine whether the evidence persuades the jury whether the Government has shown beyond a reasonable doubt that in light of the language of II(a)(4) the substance tested was a controlled substance.
>
> It seems to me that's consistent with the way the case was presented to the jury. I think it enables the Government to have the benefit of the Court's previous conclusion that cocaine is a controlled substance and still admits to the defense their theory that certain isomers are not, and if you think the Government has failed to prove it was not one of the isomers, you can argue that the Government has failed to prove it was not one of the isomers which is fairly to be interpreted within Subsection 4.

When so much of the instruction as defendant objected to is considered in the text of the balance of the instruction it can be seen that the law as applied to this case was

fairly stated.[3] Adequate allowance was also made for the

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[3] The court instructed in part:

> In considering whether the Government has met its burden of proof as to the identity of the substance allegedly sold by the defendants, you may consider approaching the problem in the following fashion:
>
> At the outset, you have already been instructed that the defendant in a criminal case has no burden. The burden never shifts from the Government to establish its case beyond a reasonable doubt. You may draw no inference whatsoever from the failure of the defendant's chemist to test the substance in question.
>
> You may first consider whether the Government has proven beyond a reasonable doubt that the substance tested was coca leaves, or any salt, compound, derivative or preparation of coca leaves, or any salt, compound, derivative or preparation thereof which is chemically equivalent or identical to any of these substances.
>
> The testimony in the case has revealed that cocaine is an alkaloid with a variety of isomers. It is not disputed that the only isomer which is naturally derived from the coca plant is l-cocaine. L-cocaine can be synthetically constructed from non-coca leaf origins. L-cocaine is clearly covered by the statute. Therefore, you may first consider whether or not the substance tested was l-cocaine. If you find beyond a reasonable doubt that the substance tested was l-cocaine, then you have found that this substance is a Schedule II controlled substance.
>
> In arriving at this decision, you may consider whether or not, or to what degree, the tests performed by the Government chemist were specified for l-cocaine.
>
> If you find that the substance tested was something other than l-cocaine then, having heard the testimony of the expert witnesses with regard to the degree of specificity and certainty associated with the various tests, you must determine whether or not the substance tested was "chemically equivalent or identical" with coca leaves, or any salt, compound, derivative, or preparation of coca leaves. If you find beyond a reasonable doubt that the substance tested was "chemically equivalent or identi-

(Footnote continued)

defendant's theory of the case which was that only l-cocaine was controlled and that the other seven isomers, not being derived from coca leaves nor chemically equivalent or identical, were not controlled. The Government's test evidence was required to demonstrate, according to the defendant, that the powder was l-cocaine.

(Footnote continued)

cal" then you have found that this substance is a Schedule II Controlled Substance.

One of the elements of the offense charged in Count II is that the substance tested by the Government chemist is cocaine as cocaine is defined in the Controlled Substances Act—Controlled Substances Act, Title 21, Section 841(a)(1), Schedule II(a)(4).

I have previously read to you the language of that statute. That statute, and that statute only, covers those forms of cocaine which are derivatives of coca leaves or which are chemically equivalent or identical to such derivatives. The defendants cannot be convicted of Count II unless the Government has proved beyond a reasonable doubt that the substance tested by the Government chemist is a form of cocaine that is either a derivative of coca leaves or a substance chemically equivalent or identical to such a derivative.

There are only two ways in which the Government could meet its burden of proving that the substance tested by its chemist falls within the statute.

The first is to prove beyond a reasonable doubt that the substance is a derivative of coca leaves. The second is to prove beyond a reasonable doubt that the substance is chemically equivalent or identical to a derivative of coca leaves. You may not speculate as to the identity of the substance. If you have a reasonable doubt that the substance tested by the Government chemist is a form of cocaine covered by the statute, you must find the defendants not guilty of Count II. Similarly, if all that the Government has proved is that the substance is cocaine without proving that it is either a derivative of coca leaves or a substance chemically equivalent or identical to such derivatives, then the Government has not proven its case as to Count II.

The jury was not instructed that the transactional powder was l-cocaine. The instructions left to the jury the question of whether the transactional powder was or was not l-cocaine, or whether it was in the language of the statute some other substance chemically equivalent or identical thereto.

The defendant further argues that the instructions permitted a non-unanimous verdict of guilty since part of the jury might have believed that the proof showed this powder to be l-cocaine and the balance of the jury might have found it to be some substance chemically equivalent or identical to l-cocaine. The indictment charged that the powder involved was a controlled substance, and considering the evidence under the instructions the jury found that it was, and consequently rendered a verdict of guilty. That was all that was required. If it had been considered that it was important to know how the jury arrived at its verdict, what its thinking or conclusion was about the particular identity of the controlled substance, a special verdict could have been requested by the defendant. Though we may seriously question the general use of special verdicts in the federal courts, we note no such request in the record.

As a whole we find no reversible error in the instructions given nor in the other issues raised in this appeal, and therefore we affirm.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1315

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JOSEPH ORZECHOWSKI,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin—No. 75 Cr 83
Robert W. Warren, *Judge.*

Argued September 21, 1976—Decided November 24, 1976

Before HASTINGS, *Senior Circuit Judge,* and PELL and WOOD, JR., *Circuit Judges.*

WOOOD, JR., *Circuit Judge.* By an indictment returned on April 22, 1975, the defendant, Michael Joseph Orzechowski was charged in two counts with violation of 21 U.S.C. § 841.[1] Count I charges that on March 24, 1975,

[1] In pertinent part § 841 provides:

. . . it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .

the defendant unlawfully possessed with intent to distribute, and did distribute 13.602 grams of cocaine, a Schedule II Narcotic Drug Controlled Substance. Count II charges a similar offense involving 27.493 grams of cocaine occurred the following day. After a three day jury trial the defendant was found guilty. The defendant's Motions for Judgment of Acquittal and New Trial were denied, and on March 15, 1976, defendant was sentenced to 120 days imprisonment to run concurrently on each count, to be followed by a three year special parole term on each count. This appeal followed.

The transactional evidence is not in dispute. A special agent of the Drug Enforcement Administration received a telephone call on March 24, 1975, from the defendant offering to sell cocaine for $1,350 per ounce to the agent, not known by defendant to be an agent. During a subsequent phone conversation that day the agent offered to buy only a half ounce of cocaine as he explained he wanted to check its quality. Later that same day the agent and the defendant met in person to close the transaction. At this time the defendant represented the cocaine as being of "very high quality," which, he explained, was due to the fact that his partner was the smuggler. The defendant also represented that he could supply a large quantity of cocaine, four or five ounces, and that the more purchased the higher the quality would be, up to 85% in purity. The agent then paid the defendant $680 and received in return a clear plastic bag containing white powder. The following day the defendant again called the agent to see if he was satisfied with the cocaine delivered on the prior day and to inquire about a possible additional sale. The agent advised the defendant that the quality was satisfactory but it had not yet been decided how much cocaine would be purchased the next time. This led to another telephone call

from the defendant a short time later in which the agent stated that he desired on this second occasion to buy a full ounce to better help determine what the quality of the cocaine would be if he later purchased as much as a pound. Shortly after that, by agreement, the agent and the defendant met to close this second transaction. The defendant represented the ounce of cocaine being sold to the agent as being of better quality than the cocaine of the day before. The price was again $1,350 per ounce. Defendant expressed a desire to deal in larger quantities, pounds and half pounds, as in this way, he explained, he could earn between $2,000 and $3,000 per week, which was preferable to working. The agent gave the defendant $1,350 and the defendant gave the agent in return the second clear plastic bag containing white powder.

The defendant raises five issues on appeal claiming: 1) the Government failed to identify the white powder in each transaction as being a controlled substance;[2] 2) the Government failed to provide defendant with certain Government documents claimed to be exculpatory; 3) the court

[2] The term controlled substance is described in 21 U.S.C. § 802 (6), as a "Drug or other substance, or immediate precursor, included in Schedule I, II, III, IV or V" of Part B of that subchapter. The indictment refers to a Schedule II substance. Section 812 (b)(2) identifies a Schedule II drug as a drug or other substance which (a) has a high potential for abuse, (b) has a currently accepted medical use in the United States, or has a currently accepted medical use with severe restrictions, and (c) abuse may lead to severe psychological dependence. Thereafter in § 812 set forth in Schedule II(a)(4) is the following listing as a controlled substance:

> Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances. . . .

failed to instruct on what were claimed to be two central issues of the case; 4) the charges in each count were duplications; and 5) the instructions given were also duplications.

I.

The Identification of The Substance

The defendant does not dispute that he sold two quantities of a substance he represented to be cocaine to the Government agent, but does dispute that the Government's evidence established beyond a reasonable doubt that those substances were in fact controlled substances as alleged in the indictment.

The manner of the listing of substances in the schedules is not uniform. Many are listed by chemical name. The listing here in question controls substances related to, or derived or prepared from coca leaves, but the control is also extended to any such substances or preparations which are "chemically equivalent or identical with any of these substances."

The parties agree on the import of this listing. Those isomeric forms of cocaine which can be derived from coca leaves are controlled, but any isomers that cannot be so derived are controlled only if they are chemically equivalent or identical to the forms which are derived from the plant. Isomers are commonly referred to as chemical relatives. The parties further agree that one of the isomers of cocaine, l-cocaine, can be obtained from the plant, but that one of the other isomers of cocaine, d-cocaine, cannot be so derived. D-cocaine to be controlled, therefore, must be shown to be chemically identical or equivalent.

The Government claims that the white powder obtained from the defendant in both instances was l-cocaine, but if

not, it was d-cocaine, which it claims is chemically identical or equivalent, and therefore also controlled. In effect the Government's position is that it makes no difference which isomer it was. The defendant claims that the Government failed to prove that the powder was l-cocaine, and that, therefore, if the powder may have been d-cocaine, it was not shown to be chemically equivalent or identical to those substances derived from the plant. The defendant's position is that the powder was not shown to be a controlled substance.

Both the Government and the defendant offered the testimony of experts, but there were critical disagreements in their testimony.

The Government chemist testified that in his opinion, after the performance of seven various tests, the white powder in both transactions was l-cocaine. The tests used to arrive at this conclusion were a spot or strength test using cobalt thicyanate; two microcrystalline tests, using plastinic chloride for one and gold chloride for the other; gas chromatography; mass spectromatry; infrared spectrophotometry; and mixed melting point. It was shown that these tests may help to identify the substance, but the only test administered which could distinguish l-cocaine from d-cocaine was the mixed melting point test.

This latter test, the mixed melting point test, is the one in question. The defendant claims that it was not properly performed since the results obtained were not in line with authoritative literature on the subject. Thus this test was unreliable to determine which isomer, l-cocaine or d-cocaine, may have been involved, the defendant argues. It is not necessary to technically explore the specifics of this or other tests except to note the area of disagree-

ment. The Government chemist testified that he determined from this test that the substances tested, the known substance and the two quantities of the white powder, all melted separately and in combination of 242° centigrade and that that result justified his conclusion that the white powder was l-cocaine. The defendant, relying on a recognized treatise, claimed that the Government chemist's conclusion could only have been justified by a result showing a melting point of 215° centigrade, not 242°. Therefore, the defendant concludes, either the test was improperly administered so that it had no evidentiary value or the white powder was not l-cocaine. The Government chemist thought otherwise and explained that the manner in which the substances were prepared for the tests by him could have affected the melting point, but not his resulting conclusion. The Government also pointed out that the defense expert recognized from his examination of literature on the subject that there could exist some variance in melting points. The record reveals that the defendant's expert had never actually run such a test himself to determine the melting point of l-cocaine. The defendant's defense did not include an independent test of any kind of the white powder involved.

The defendant next argues that since the mixed melting point test as run was not determinative, the Government should have run in addition a polarimetry test which, it is also agreed, could likewise distinguish between the d- and l- isomers of cocaine.

The next critical area of chemical testimony between the experts, which becomes important only if the l-cocaine identity conclusion of the Government witness is to be disregarded leaving the possibility that the white powder

might be d-cocaine, is whether or not d-cocaine is chemically identical or equivalent to l-cocaine. The Government chemist testified that in his opinion d-cocaine was chemically equivalent or identical to the substance derived from the plant. The defense expert took a different view and explained that d- and l- isomers of cocaine react differently with other chemical reagents and in living organisms. The defendant characterizes the Government expert's opinion on this issue as only a guess and not entitled to any weight as an expert opinion.

The quality of the Government's case on the issue of identification of the white powder substances left something to be desired, but not so much as to require that the jury's verdict be set aside. The record reveals that the informed defense helped educate the Government on what its laboratory evidence should have been if all doubt was to be resolved about the identity of substances. No one expects, however, all experts to agree. It is apparent that the Government's laboratory work ran the risk of jeopardizing the success of the undercover agent's efforts.

In reviewing the sufficiency of this evidence we do not act as the trier of the facts to reconsider guilt or innocence. Our purpose is to determine if a rational trier of the fact could have found beyond a reasonable doubt that the defendant sold a controlled substance as charged. In resolving that issue we must view the evidence and all reasonable inferences therefrom in the light most favorable to the Government, remembering, also, the jury's right to weigh the evidence, determine the credibility of witnesses, and draw justifiable inferences. *Glasser* v. *United States,* 315 U.S. 60 (1942); *United States* v. *Scher,* 476 F.2d 319 (7th Cir. 1973); *United States* v. *Cardi,* 478 F.2d

1362 (7th Cir. 1973), *cert. denied,* 414 U.S. 852 and 414 U.S. 1001; *United States* v. *Isaacs,* 493 F.2d 1124 (7th Cir. 1974), *cert. denied,* 417 U.S. 976.

The Government chemist sufficiently explained the conduct of the tests and accounted for the possible variation in the melting point. That being true, the mixed melting point test was adequate for identification purposes and the running of the polarimetry test, as advisable as it may have been, was not absolutely required. Also, if the mixed melting point test as run was adequate, there could remain no need to consider the other alternative, whether or not l-cocaine and d-cocaine are chemically equivalent or identical, but in the circumstances of this case that issue will also be examined.

Even though the Government's expert's foundation for his opinion that l- and d- cocaine are chemically equivalent or identical was limited, he was found to be an expert by the court, and his training and experience justified permitting him to state and explain his opinion. That his opinion was disputed and contradicted by the defendant's expert who stated the contrary as a matter of scientific fact does not require that the Government expert's opinion be totally rejected by this court as a matter of law. The defendant cites *United States* v. *Cooper,* 277 F.2d 857 (5th Cir. 1960), for the proposition that an expert may give his opinion based on assumptions stated by him, but if those assumptions are not proved, testified to or otherwise taken to be true, the opinion is to be rejected as worthless. That was a civil condemnation case where the court held that one qualified as a hydraulic engineer was not thereby qualified to state his opinion on the issue of the probability of the use of certain real estate for a dam within the reasonably near future as might affect the issue of damages.

That expert was recognized only as an expert as to the practicability of building a dam, not as an expert as to future real estate values. In the present case the subject matter was one within the general area of expertise of the Government expert who testified as to his opinion.

The determination of the qualifications of an expert is a matter ordinarily left to the discretion of the trial court. In this case the Government witness was a forensic chemist with a Bachelor of Science degree in chemistry employed by the Drug Enforcement Administration for the last seven years. He testified that he had analyzed substances over 3600 times. We can find no abuse of discretion by the district court in permitting the Government expert to testify and state his opinion. That opinion could be given such weight as the jury might see fit in accordance with the court's instructions.

The jury was fully instructed on the consideration, if any, to be given to the testimony of the experts on the identification issue.[3]

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[3] The court instructed that:

The defendant cannot be convicted of these offenses unless the Government has proved beyond a reasonable doubt that the substances tested by the Government chemist are a form of cocaine, that is, either a derivative of coca leaves or a substance chemically equivalent or identical to such a derivative. There are only two ways that the Government could meet its burden of proof, that the substances tested by its chemist fall within the statute; the first is to prove beyond a reasonable doubt that the substances are a derivative of coca leaves. The second is to prove beyond a reasonable doubt that the substances are chemically equivalent or identical to a derivative of coca leaves. You may not speculate as to the identity of these substances. If you have reasonable doubt that the substances tested by the Government chemist are a form of cocaine covered by the statute you must find the defendant not guilty. Similarly, if all the defendant

(Footnote continued)

This whole subject matter was further well explained and argued to the jury by defense counsel. The jury was also fully instructed by the trial judge on the defendant's theory of the case.[4] There is no reason to believe that the

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(Footnote continued)

(sic) has proven is that the substances are cocaine, without proving that they are either derivatives of coca leaves or substances chemically equivalent or identical to such derivatives, then the Government has not proven its case.

* * *

The jury should consider all of the facts and circumstances and evidence to determine which of the witnesses are worthy of greater credence.

* * *

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An expert witness, however, is in a separate category. An expert witness is someone who by education and experience has become expert in some science, may state an opinion as to relevant and material matters in which they profess to be an expert, and may also state the reasons for the opinion. Expert witnesses have testified in this case. In determining what weight you should give to their opinions, you may consider their experience, educational background, theoretical understanding of the scientific discipline and the knowledge they have gained through reading authoritative scientific treatises and periodicals.

[4] The court further instructed:

It is the defendant's theory of this case that l-cocaine is a derivative of coca leaves and that d-cocaine is neither a derivative of coca leaves nor a substance which is chemically identical or equivalent to a derivative of coca leaves. That d-cocaine and l-cocaine react differently with the chiral reagents and have different chiral reagents, and have different physiological effects, and that the only substance which is chemically identical or equivalent to the l-cocaine, which is a derivative of coca leaves, is synthetically produced, l-cocaine. It is further his theory that prior to performing the tests in this case, the Government chemist had no experience in performing a mixed melting point test

(Footnote continued)

jury did not understand the issues and follow the court's instructions conscientiously. *United States* v. *Harris,* 211 F.2d 656 (7th Cir. 1954), *cert. denied,* 348 U.S. 822.

What a substance is represented to be by one offering to sell it in such circumstances is ordinarily entitled to little or no weight. The defendant in this case at the time of the first sale represented the white powder to be good quality cocaine. He then came back to sell a second time after knowing that the buyer intended to check the powder he had sold him the first time. The defendant represented the powder to be high quality cocaine and expressed a strong desire and motivation for future larger sales based on that representation. The jury, therefore, had some basis under these circumstances for giving this defendant at least a little credit for knowing what he was talking about when he represented the powder to be good quality cocaine.

(Footnote continued)

on substances suspected of being l-cocaine, that he was not present when the supposed standard of l-cocaine was received in the laboratory, and never tested the proposed standard that the mixed melting point which he obtained was substantially higher than what he would have obtained had the substance which he tested been cocaine chloral platinate, and that if the substances which he tested by the mixed melting point were not pure, then the mixed melting point of the purer substance would have been even higher than the temperature which he measured. It is further his theory that the government chemist relied neither on standard reference spectra nor recognized scientific treatises in the field of analytic chemistry and that he did not compare his test results with that which appears in the scientific literature. If the evidence you have heard in support of the defendant's theory creates in your mind a reasonable doubt that the tests performed in this case are specific for a derivative of coca leaves or a substance which is chemically equivalent or identical to such a substance, then you must find the defendant not guilty.

II

Failure of Government to Provide Defendant With Certain Documents Claimed To Be Exculpatory

Before and during trial the defendant sought and was denied access to certain Drug Enforcement Administration, internal memoranda which related, among other things, to the tests necessary for determining whether a substance represented to be cocaine was an unlawful isomer of cocaine. The existence of these memoranda was verified during cross-examination and made available to the trial judge after the jury retired. Otherwise there were no discovery complaints as the Government followed an "open file" policy. Those papers, now a part of the record, included: (1) an internal general technical research report transmitted between two divisions of the Drug Enforcement Administration regarding research into an identification of optical isomers of cocaine; (2) a general internal Drug Enforcement Administration memorandum dealing with when, as a matter of general policy, the Drug Enforcement Administration should perform special polarimetry tests on cocaine evidence samples; and (3) a general internal Drug Enforcement Administration memorandum making lower Drug Enforcement Administration officials aware of potential optical isomers issues in the identification of cocaine evidence. This memorandum included several other general memoranda from various attorneys in the Drug Enforcement Administration and the Justice Department for the purpose of generally warning personnel within the Drug Enforcement Administration that the l-d isomer issue might arise in cocaine prosecutions. None of these allegedly exculpatory memoranda were concerned specifically with the appellant's prosecution; none were used by attorneys for the Government preparing for or trying the case; and none contained the statements of any witness who testified.

The defendant claims and the Government denies that the documents were producible under Fed.R.Crim.P. 16. The Government relies on the exclusion provided in Rule 16(a)(2).[5] The defendant contends that the exclusion is not applicable since the papers were not "made by the attorney for the government or other governmental agents in connection with the investigation or prosecution of the case"; because the exclusion applies to pretrial, not trial, disclosures; and because the research report falls within (a)(1)(D) of the Rule to which (a)(2) does not apply.[6]

The defendant correctly argues on the basis of *United States* v. *Nobles,* 422 U.S. 225 (1975), that Rule 16 is designed to govern pretrial disclosure, not to constrict a district court's control over evidentiary questions arising during trial. Since the defendant continuously sought dis-

[5] Rule 16(a)(2) reads:

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

[6] Rule 16(a)(1)(D) reads:

(D) *Reports of Examinations and Tests.* Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

closure of the memoranda throughout the trial, the (a)(2) exclusion is of no avail to the Government. Nor is subsection (a)(1)(D) of avail to the defendant since the memoranda, even if we consider them to be reports of examination and tests within the language of that subsection, admittedly were not made in connection with this case. The Notes of the Advisory Committee state that the "obligation of disclosure applies only to scientific tests or experiments 'made in connection with the particular case.' " Fed.R.Crim.P. 16, Notes of Advisory Committee, 1974 Amendment, 18 U.S.C. at 1318 (Supp. V., 1975). The rule does not compel disclosure.

Since these memoranda did not include the prior statement of any witness who testified, they were not producible under the Jencks Act, 18 U.S.C. § 3500.

A remaining consideration is the application of *Brady* v. *Maryland,* 373 U.S. 83 (1963), as the memoranda are claimed by the defendant to be material and exculpatory. We believe they are neither. The defendant is not entitled to a reversal unless in the light of all the evidence introduced at trial the unrevealed evidence is material. *United States* v. *Esposito,* 523 F.2d 242 (7th Cir. 1975), *cert. denied,* 444 U.S.L.W. 3564 (April 5, 1976). The most recent case dealing with this subject is *United States* v. *Agurs,* ..... U.S. ....., 44 U.S.L.W. 5013 (U.S. June 24, 1976). The omission to disclose, it is held, in a constitutional sense must be found to have deprived the defendant of a fair trial as evaluated in the context of the whole record before reversal is required The test of materiality, the Court indicates, may vary according to the circumstances, but the case is not read as requiring, even in circumstances where the threshold test of materiality may be low, that as a matter of constitutional law everything must be disclosed which might influence a jury. Evaluating the omis-

sion here in the context of the entire record, we cannot find that the failure to supply these memoranda, not directly related to this case, was of such significance that the defendant was thereby deprived of a fair trial. The memoranda only evidenced a Government awareness and concern with the same cocaine isomer issue which the defendant raised and thoroughly explored at trial. His defense on that issue was not dependent on the memoranda. Every nondisclosure is not material. If this was error it was harmless. After considering the memoranda submitted to him at the conclusion of the trial, the trial judge summed up his view in these terms:

> In the context of this case it is apparent that no substantial deprivation was inflicted upon the defense by virtue of the failure to produce these documents during the course of or prior to the trial. The defendant's attorneys were well versed in the science of chemistry and were very much aware of the analyses disclosed by these materials. The defense devoted lengthy direct and cross-examination to these very principles and theories. In view of this circumstance the Court cannot now hold that substantial prejudice has resulted from the conduct of the government's agents and attorneys.

III.

Instructions

The defendant concedes that to a large measure his tendered instructions were given. His first objection, however, is to the fact that the court permitted the jury, under the instructions, to consider the Government's alternate theory that d-cocaine and l-cocaine were chemically identical or equivalent, instead of limiting the issue to whether or not the Government had proven that the powder was l-cocaine. The basis of this objection is the claim that the

Government's evidence was insufficient to permit the alternate theory to go to the jury. We find no merit to that position, and based on evidence we have already discussed, believe the question was a question of fact properly left for the jury.

Next, the defendant contends that he was entitled to an instruction defining the term "chemical equivalents." The jury was instructed that the Government's burden of proof required that the powder be shown to be either l-cocaine or alternatively d-cocaine, provided d-cocaine was also shown to be "chemically equivalent or identical to l-cocaine." No instruction as to the meaning of the statutory phrase "chemically equivalent or identical" was given. The defendant urged the giving of an instruction to the effect that to be chemically equivalent or identical the substances must not only have the same chemical formula but the substances must also have the same chemical reaction with other chemicals. Both the Government and defense experts agree in principle with this explanation of the terms. The meaning of the phrase was, therefore, not in dispute between them, only the result of its application. Although the statute defines certain other of its own terms, it offers no definition of this phrase. None is needed. The terms have a common meaning and were used in the conventional sense. The similarities or differences of the two isomers were fully explored in the evidence and arguments before the jury. As in *United States* v. *Kramer,* 355 F.2d 891 (7th Cir. 1966), partially vacated and remanded on other grounds, 384 U.S. 100 (1966), in some circumstances an elaboration on the meaning of statutory words may be preferred, but here, as there, it cannot be said that the instructions were so inadequate that the jury could not fairly determine the issue. If it was error not to instruct on the meaning of these terms, it also was a harmless error.

IV.

Duplicity

Defendant claims that each of the two counts is duplicitous in that each charges possession with intent to distribute, together with the actual distribution of cocaine. Title 18 U.S.C. § 841(a)(1) makes it unlawful to "distribute" or to "possess with intent to distribute" a controlled substance. The question resulting is whether or not this is a case of alleging in one count the commission of multiple acts in violation of the same statutory provision, or a case of separate and distinct offenses being alleged in the same count.

"Duplicity" is the joining in a single count of two or more distinct and separate offenses. 1 Wright, *Federal Practice and Procedure,* § 142, at 306 (1969 ed.) One of the vices of duplicity is, as defendant argues, that the verdict does not reveal whether the jury found the defendant guilty on both or one or the other of the offenses charged.

The circuits are not in agreement. The Fourth and Sixth Circuits have taken the position that in cases where a single sale of a controlled substance gives rise to separate counts charging possession and sale there is in effect a merger of the two offenses permitting only one sentence upon conviction of both counts. *United States* v. *Atkinson,* 512 F.2d 1235 (4th Cir. 1975), *petition for cert. filed,* 45 U.S.L.W. 3011 (July 12, 1976); *United States* v. *Curry,* 512 F.2d 1299 (4th Cir. 1975), *cert. denied,* 423 U.S. 832 (1975); *United States* v. *Stevens,* 521 F.2d 334 (6th Cir. 1975). *See also United States* v. *Nichols,* 401 F.Supp. 1377 (E.D. Mich. 1975). Therefore, following this reasoning, to join possession and distribution in one count may not be duplicitous.

The Fifth Circuit takes another view. Upon conviction on separate counts of possession with intent to distribute, and distribution of a controlled substance, each count stands separately for sentencing purposes. There is no merger. The "different evidence" test is applied. Convictions for separate offenses arising out of the same factual situation are held to be permissible if the statute proscribing the conduct requires proof of different facts and elements as to each of the separate offenses. *United States* v. *Horsley,* 519 F.2d 1264 (5th Cir. 1975), *cert. denied,* 96 S.Ct. 1413 (1976); *United States* v. *Costello,* 483 F.2d 1366 (5th Cir. 1973). It follows, therefore, that in that circuit to join possession with intent to distribute and distribution in one count would be duplicitous.

The Tenth Circuit has also considered the problem. It has held that it is not duplicitous to charge possession with intent to distribute together with distribution in one count since § 841(a)(1) sets forth several ways in which the statute may be violated, including both distribution and possession with intent to distribute. Therefore, it is proper to allege in the conjunctive without the indictment being duplicitous. *United States* v. *Herbert,* 502 F.2d 890 (10th Cir. 1974), *cert. denied* 420 U.S. 931; *Cordova* v. *United States,* 303 F.2d 454 (10th Cir. 1962). *Accord, United States* v. *Hobbs,* 392 F.Supp. 444 (D.Mass. 1975); *United States* v. *DiLaura,* 394 F.Supp. 770 (D.Mass. 1974).

The approach of the Tenth Circuit has been followed in other statutory situations. *United States* v. *Zeidman,* No. 76-1173 (7th Cir. Aug. 20, 1976); *Troutman* v. *United States,* 100 F.2d 628 (10th Cir. 1938); *Joyce* v. *United States,* 454 F.2d 971 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 969; *United States* v. *Astolas,* 487 F.2d 275 (2d Cir. 1973), *cert. denied,* 416 U.S. 955.

Former § 4704(a) of Title 26 U.S.C., repealed in 1970, provided that it was unlawful to purchase, sell, dispense or distribute a narcotic drug not in or from the original package bearing tax stamps. The defendant in *Turner* v. *United States,* 396 U.S. 398 (1970), was charged in one count with purchasing, dispensing and distributing heroin in violation of that section. Although duplicity was not directly raised as an issue, the Supreme Court stated that, "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged."

We see no reason why that general rule should not be applicable here. The offense charged in each count, possession with intent to distribute and distribution, alleged in the conjunctive, was statutory language drawn from the same sentence of subsection (a)(1). We hold that the counts are not duplicitous.

There being no duplicity found in the charges, none is found in the instructions.

We affirm.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 75-CR-103

CLARK J. UMENTUM,
JOHN OTTO MITTELSTAEDT,
MARILYN JOSETTA PIECHOTA,
CHERYL GIBBONS, and
DAVID ALAN WINKKA,
Defendants.

DECISION and ORDER

The defendants in this action have filed motions to dismiss the first two counts of the indictment, to compel the government to elect between counts and between offenses within counts, to compel disclosure of exculpatory evidence, for a bill of particulars, and to suppress certain physical evidence and statements. An evidentiary hearing was held on September 12, 1975, in connection with the defendants' motions to suppress as evidence certain property seized from an automobile; the latter motions to suppress were denied. The other motions are before me now for decision.

• • •

MOTION TO DISMISS OR ELECT

The defendants Umentum and Piechota have moved to dismiss count II of the indictment or, in the alternative, for an order requiring the government to elect to pursue one of the two offenses which they contend are charged

in count II. That count charges the defendants with possessing with intent to distribute and distributing cocaine, in violation of 21 U.S.C. § 841(a)(1). The defendants contend that possessing with intent to distribute and distributing are separate and distinct offenses, and that count II is defective for charging both offenses in one count.

Some statutes are directed against certain defined modes for accomplishing a general object and impose criminal penalties upon the doing of any of several specified things, each having reference to that object. Under such statute, the doing of the prohibited thing in each and all of the prohibited modes may be charged in the conjunctive in one count. Crain v. United States, 162 U.S. 625 (1896); United States v. Amick, 439 F.2d 351 (7th Cir. 1971). I believe that 21 U.S.C. § 841 is directed generally against the process of distributing controlled substances in this country and that possession with intent to distribute and distribution itself are only different modes of violating the statute's proscriptions. See United States v. Herbert, 502 F.2d 890 (10th Cir. 1974). Accordingly, the defendants' motion to dismiss or elect will be denied.

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CONCLUSION

Therefore, It Is Ordered that the motions of the defendants Mittelstaedt, Gibbons, Umentum and Piechota to dismiss counts I and II of the indictment be and hereby are denied.

It Is Also Ordered that the motions of the defendants Mittelstaedt, Gibbons, Umentum and Piechota to dismiss count I of the indictment be and hereby are denied.

It Is Further Ordered that the motion of the defendants Mittelstaedt and Gibbons to compel the government to elect between trying count I or count II of the indictment be and hereby is denied.

It Is Further Ordered that the motion of the defendants Umentum and Piechota to dismiss or elect directed to count II of the indictment be and hereby is denied.

It Is Further Ordered that the motions of the defendants Umentum and Piechota for the disclosure of exculpatory evidence and for a bill of particulars be and hereby are denied.

It Is Further Ordered that the motions of the defendants Gibbons and Piechota to suppress as evidence property and statements taken from them subsequent to their arrests be and hereby are denied.

Dated at Milwaukee, Wisconsin, this 19 day of September, 1975.

/s/ *Myron L. Gordon*
U. S. District Judge

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 76-886

In the Supreme Court of the United States

OCTOBER TERM, 1976

CLARK J. UMENTUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 547 F. 2d 987. The opinion of the district court (Pet. App. 33a-35a) is reported at 401 F. Supp. 746.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1976. The petition for a writ of certiorari was filed on December 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by a count in the indictment that charged both possession of a controlled substance with intent to distribute and the distribution of a controlled substance.

2. Whether the jury must find the commission of an overt act to support a conspiracy conviction under 21 U.S.C. 846.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on one count of conspiring to possess and distribute cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846 and 18 U.S.C. 2, and on one count of possessing with intent to distribute and distributing 878.5 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of seven years' imprisonment on each count, to be followed by a three-year term of special parole. The court of appeals affirmed (Pet. App. 1a-13a).

Following two telephone conversations in April 1975 between a special agent of the Drug Enforcement Administration and one of petitioner's co-defendants, a meeting was arranged for the purpose of purchasing 25 ounces of cocaine for $40,625. Two special agents thereafter met with petitioner and other co-conspirators at a restaurant. Following initial negotiations for the purchase of cocaine, the men went to the parking lot of the restaurant. There, petitioner opened the trunk of a car and showed the agents a plastic bag of white powder that petitioner represented to be cocaine. Petitioner and his confederates were then placed under arrest and the bag of white powder was seized[1] (Tr. 229-270, 372-375).

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[1]Petitioner premised his defense at trial upon the theory that the tests performed by the government chemist were insufficient to establish the identity of the material involved as a controlled substance (Brief for Appellant, p. 2). He does not now repeat this challenge.

ARGUMENT

1. Petitioner contends (Pet. 4, 5-6) that count II of the indictment is duplicitous because it charges separate offenses, *i.e.*, possession of a controlled substance with intent to distribute and distribution of a controlled substance.[2] The court of appeals rejected this claim on the ground that possession and distribution of a controlled substance are different means of violating the same statute (Pet. App. 4a, 31a-32a; see *Turner* v. *United States*, 396 U.S. 398, 420).[3] We recognize that there is an apparent disagreement among the circuits whether possession with intent to distribute and distribution should be charged in separate counts or a single count.[4] But there is no need to resolve the issue in this case.

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[2]Count II charged that petitioner and others "did knowingly, wilfully, and unlawfully possess with intent to distribute and did distribute approximately 878.5 grams (gross weight) of cocaine, a Schedule II Narcotic Drug Controlled Substance, all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

[3]The court instructed the jury that in order to convict under count II, it must find, *inter alia*, that the government established that "the defendants distributed or possessed with intent to distribute a controlled substance * * *" (Tr. 1188; see Tr. 1226).

[4]The Fifth Circuit has held that possession with intent to distribute and distribution may be charged in separate counts and may constitute separate offenses. *United States* v. *Horsley*, 519 F. 2d 1264, 1265-1266 (C.A. 5), certiorari denied, 424 U.S. 944; see also *United States* v. *Costello*, 483 F. 2d 1366, 1368 (C.A. 5); cf. *United States* v. *Gonzalez*, (C.A. 2), certiorari denied, January 10, 1977 (No. 76-5555). The Sixth and Fourth Circuits have also adopted this position, although those circuits have held that, where there is no evidence of possession apart from the actual distribution, the offenses merge for purposes of sentencing. *United States* v. *Stevens*, 521 F. 2d 334, 337 (C.A. 6); *United States* v. *Curry*, 512 F. 2d 1299, 1306 (C.A. 4); *United States* v. *Atkinson*, 512 F. 2d 1235, 1240 (C.A. 4).

The court of appeals here, on the other hand, appears to have aligned itself with the Tenth Circuit, which takes the position that possession

The principal vice of duplicity is that it may not be clear whether a general verdict of guilty represents the unanimous view of the jury that the defendant committed one or more of the acts charged (see Pet. App. 30a). That vice is not present in this case. The evidence here showed that the cocaine was in the trunk of a car and that petitioner removed the cocaine from the car in the agent's presence. Given the preexisting agreement that petitioner was going to sell the cocaine to the agent, the jury had a sound basis to conclude that petitioner possessed the drug with intent to distribute.[5] Moreover, as the district court found (Transcript of proceedings upon imposition of sentence, p. 45):

> [U]nder the evidence presented in this case, no member of the jury could have found the defendant guilty of distribution without [also] believing the evidence which itself established possession with intent to distribute. * * *

Thus, the verdict in this case necessarily represented the unanimous view of the jury that petitioner possessed

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and distribution of a controlled substance are merely different means of violating the same statute and thus must be charged in a single count. *United States* v. *Herbert*, 502 F. 2d 890 (C.A. 10), certiorari denied, 420 U.S. 931. Accord, *United States* v. *Hobbs*, 392 F. Supp. 444 (D. Mass.); *United States* v. *DiLaura*, 394 F. Supp. 770 (D. Mass.).

In our brief in opposition in *United States* v. *Gonzalez*, *supra*, a copy of which we are sending to counsel for petitioner, we took the position that possession and distribution of a controlled substance may properly be charged as separate offenses. (It should be noted, however, that in *Gonzalez* there was substantial evidence of possession other than at the time of the actual distribution, whereas here the charges of possession and distribution both involve the arrangement to sell cocaine described above.)

[5]Correspondingly, there was little, if any, evidence to sustain the charge that the cocaine had been distributed to the agents. Petitioner and his co-conspirators were arrested before either the purchase money or the cocaine changed hands.

cocaine with the intent to dictribute it. Cf. *United States* v. *Gaddis*, 424 U.S. 544, 549. As the district court stated (Transcript of proceedings upon imposition of sentence, p. 45): "there was no opportunity for the defendant to be prejudiced by a non-unanimous conviction * * *." Accordingly, petitioner suffered no prejudice by inclusion of both charges in count II, whether or not the count was duplicitous. See also *United States* v. *Natelli*, 527 F. 2d 311, 325 (C.A. 2).

2. Petitioner also contends (Pet. 7) that it was error for the district court to fail to instruct the jury that it had to find the commission of an overt act in furtherance of the conspiracy in order to convict on the conspiracy charge. Unlike the general conspiracy statute (18 U.S.C. 371), however, 21 U.S.C. 846 by its terms requires neither allegation nor proof of an overt act in furtherance of the conspiracy.[6]

At common law, an overt act was not an essential element of the crime of conspiracy, and this Court has long recognized the power of Congress to adopt a conspiracy statute that does not require the commission of such an act. *Fiswick* v. *United States*, 329 U.S. 211, 216; *Singer* v. *United States*, 323 U.S. 338, 340; *Nash* v. *United States*, 229 U.S. 373, 378. Those courts that have considered the issue under the statute that preceded Section 846 (21 U.S.C. (1964 ed.) 174) have uniformly ruled that it did not require any allegation or proof that

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[6]21 U.S.C. 846 states in relevant part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable * * *." 18 U.S.C. 371, by contrast, reads in relevant part, "If two or more persons conspire * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * * or both."

overt acts were committed in furtherance of the conspiracy.[7] As there is no indication that Congress intended to change this interpretation in reenacting that provision as 21 U.S.C. 846 (see *United States* v. *Beasley*, 519 F. 2d 233, 247 (C.A. 5), and cases there cited), the court of appeals here properly followed the preexisting approach in declining to impose a requirement of proof of an overt act. As the court said (Pet. App. 7a):

> An overt act * * * need not be charged in a § 846 conspiracy. If an overt act need not be charged, it need not be proved. If an overt act need be neither charged nor proved, there remains nothing about which to instruct on that issue.

Accord, *United States* v. *DeJesus*, 520 F. 2d 298, 301 (C.A. 1), certiorari denied, 423 U.S. 865; *United States* v. *Beasley, supra; United States* v. *Miller*, 387 F. Supp. 1097, 1100 (D. Conn.); *United States* v. *DeViteri*, 350 F. Supp. 550, 551-552 (E.D. N.Y.). See also *United States* v. *De Lazo*, 497 F. 2d 1168, 1171 (C.A. 3).

We agree with petitioner (Pet. 7) that the Tenth Circuit's brief *per curiam* decision in *United States* v. *King*, 521 F. 2d 61, 63, (C.A. 10), conflicts with the holding of the court of appeals here. In *King*, the Tenth Circuit recognized that "an indictment under section 846 need not allege overt acts," but the court nevertheless held that the jury must be instructed that the government must prove such acts to make out a

[7] *United States* v. *Murray*, 492 F. 2d 178, 192 (C.A. 9), certiorari denied, 419 U.S. 942; *Hopkins* v. *United States*, 405 F. 2d 770, 772 n. 2 (C.A. 9); *United States* v. *Garfoli*, 324 F. 2d 909 (C.A. 7); see *United States* v. *Beasley*, 519 F. 2d 233, 247 (C.A. 5).

conspiracy under that statute.[8] However, this case is not an appropriate one in which to resolve the conflict, since there is no possibility that petitioner was prejudiced by failure to follow the Tenth Circuit's view. The evidence at trial showed that petitioner possessed and attempted to sell cocaine. Those acts, which the government necessarily must have proved to obtain the conviction on count I of the indictment, also constitute the overt acts that petitioner claims must be proved to support his conspiracy conviction. Thus, even if the instructions on the conspiracy charge were insufficient, the defect was a technical one that could not have affected the verdict.

Moreover, we note that petitioner received equal concurrent sentences on both counts of the indictment, and petitioner's claim regarding the conspiracy charge does not impugn the integrity of the conviction on the substantive count. Thus, as a matter of judicial convenience the Court need not reach this issue. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

[8] In reaching that result the Tenth Circuit did not consider the contrary holdings of the other circuits; moreover, it relied on two earlier decisions in which the issue was not in fact before the courts. In *United States* v. *Jackson*, 482 F. 2d 1167 (C.A. 10), certiorari denied, 414 U.S. 1159, the only issue regarding the conspiracy count (which was brought under 21 U.S.C. 963, not Section 846), was whether the district court should have instructed the jury on multiple conspiracies. In *United States* v. *Thomas*, 468 F. 2d 422 (C.A. 10), the court assumed the need for proof of an overt act in ruling that the evidence was sufficient to establish that the defendants were part of an ongoing conspiracy under 21 U.S.C. 174.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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